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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIAM THOMAS, *et al.*,
Petitioners,
v.
WILLIAM J. ELLIOTT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

This reply brief is submitted in reply to the Respondent's Brief in Opposition to Petition for Certiorari and Suggestion of Mootness, filed with the Court on January 10, 1992. Petitioners showed in their petition that a defendant who claims that the plaintiff has failed to raise a genuine issue of material fact about whether the defendant committed the acts alleged by the plaintiff is entitled to an interlocutory appeal under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which authorizes such appeal from the district court's denial of a motion for summary judgment on the ground of qualified immunity. Petitioners further showed that the Seventh Circuit's resolution of that issue conflicts with this Court's cases, with cases from five other circuits, and with public policy supporting the right to an immediate appeal from the

denial of those officials' assertion of qualified immunity. Respondent has not rebutted these showings; indeed, since the filing of the petition, yet another circuit, the Tenth, has published a decision contrary to that of the Seventh Circuit. Respondent's claim that the case is now moot also fails. This Court should therefore grant the petition.

1. Respondent's principal argument is that this case has become moot because the case was tried to a jury on December 16-20, 1991, and petitioners won. Respondent is in error. This case is not moot because it is capable of repetition, yet evading review. A controversy is "capable of repetition, yet evading review" where, although the underlying injury is abated, the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988). Both of these requirements are satisfied here.

a. The present controversy is capable of repetition. Police officers, like other public officials, see *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), are often the target of vexatious lawsuits, as in this case. Police officers are particularly likely targets of such lawsuits brought by persons, like respondent, whom they have arrested and caused to be convicted. See *Brooks v. Scheib*, 813 F.2d 1191, 1193 (11th Cir. 1987) (noting that persons "continually in trouble with the law . . . frequently use citizen's complaints [filed with the employing city] as a means of harassing officers who arrest them"); cf. *Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976) (noting that prosecutors, if not afforded absolute immunity, could expect to be sued "with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate").

Further, even those lawsuits that are brought in good faith often erroneously accuse officers of actions that they did not commit, simply because the lawsuits often arise out of circumstances, such as arrests, in which a number of officers are involved and it is difficult for the plaintiff to be certain which officer committed which acts. See, *e.g.*, *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988) (prison altercation); *Ramirez v. Webb*, 835 F.2d 1153 (6th Cir. 1987) (execution of search warrant; complaint named thirty-six INS agents as defendants).

For these reasons, law enforcement officers have been the defendants in most of the appellate decisions that have involved the defense that the defendant did not commit the acts alleged by the plaintiff. In addition to the present case, see *Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991) (INS and customs agents); *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990) (police officer), cert. denied, 111 S. Ct. 2827 (1991); *Unwin* (police officer and state trooper); *Ramirez* (INS agents); *Anderson v. Roberts*, 823 F.2d 235 (8th Cir. 1987) (county sheriff). Petitioners in this case are all active-duty police officers in the City of Chicago; they are involved every day in law enforcement activities. There is thus a substantial likelihood that one or more of the four petitioners will again assert an entitlement to qualified immunity on the basis that he did not commit the acts alleged by the plaintiff, have that defense rejected by the district court, and appeal to the Seventh Circuit. Cf. *International Organization of Masters, Mates & Pilots v. Brown*, 111 S. Ct. 880, 885 (1991) (even though candidate had lost election, his dispute concerning distribution of campaign literature held not moot because he "has run for office before and may do so again"); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 6 (1986) (although petitioner, after initially being denied transcript it sought because of trial court's closure order, had since received transcript, case not moot because "[i]t can reasonably be assumed that petitioner will be subjected

to a similar closure order" at some future point); *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. 282, 285 n.3 (1986) (although three-year debarment of appellee from doing business with the state, pursuant to state statute debarring those who had violated the NLRA thrice in five years, had expired, problem presented was capable of repetition, yet evading review).

b. This controversy evades review because of the short time-period involved: here only 103 days, or less than three and one-half months, elapsed between the Seventh Circuit's denial of rehearing on September 4, 1991, and the district court's commencement of trial on December 16, 1991. This period of time is far less than that involved in other cases in which this Court has found controversies to be "capable of repetition, yet evading review." See, *e.g.*, *Wisconsin Department of Industry v. Gould Inc.*, 475 U.S. at 284, 285 n.3 (three-year debarment); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (eighteen-month period between legislative authorization of referendum and its submission to the voters); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (266-day human gestation period). Respondent's reliance (Br. in Opp. 4) on *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1973), for the proposition that future cases involving the same issue presented here will come to the Court "with relative speed" is misplaced. The 103-day period involved here is far less than the roughly three years between the commencement of suit and the decision by this Court in *DeFunis*, and indeed is only thirteen days longer than that within which a petition for writ of certiorari may be filed.

Respondent's speculation that petitioners may in a future case succeed in obtaining a stay of the court of appeals' mandate (Br. in Opp. 3-4) is also unconvincing. Petitioners diligently sought to stay the trial pending the disposition of their petition for writ of certiorari: they sought a stay in the court of appeals once, in the dis-

trict court thrice, and from the Circuit Justice twice.[1] There is no basis for concluding that petitioners will be any more likely to obtain a stay in any subsequent case.

Indeed, the rule in this circuit is that the "Mandate Ordinarily Will Not Be Stayed." 7th Cir. R. 41. Consistent with this rule, the Seventh Circuit refused to stay the mandate here, even though petitioners showed, without contradiction by respondent, that the court's decision conflicted with decisions from several other circuits. If this Court declines to hear this case, the Seventh Circuit is likely to deny a stay in any future case, as well, since the *Elliott v. Thomas* decision will then be settled law within the circuit. The Circuit Justice generally defers to the court of appeals' determination whether a stay of the mandate is warranted, see *Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (Marshall, Circuit Justice 1973), and this too is likely to recur in future cases. Finally, the district court is also likely to deny a stay, as it did here, where the court of appeals and Circuit Justice have denied stays. It is thus likely that subsequent cases presenting this issue will evade review if this Court declines to hear the present case.

Moreover, in this circuit, petitioners may have no significant period of time within which to seek review

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[1] Judge Easterbrook denied petitioners' timely motion to stay the mandate of the Seventh Circuit on September 11, 1991. At a status hearing on October 25, 1991, the district court set the case for trial on December 16, 1991. The district court denied petitioners' oral motion at the hearing to stay trial in light of their pending petition for writ of certiorari, and denied petitioners' motion for reconsideration of that ruling on November 7, 1991. Justice Stevens as Circuit Justice denied petitioners' motion to recall and stay the mandate of the court of appeals on November 25, 1991. On the basis of a letter sent by the Clerk of this Court on December 10, 1991, to counsel for respondent, indicating the Court's request for an opposition to the petition for writ of certiorari, petitioners renewed their stay motions before both Justice Stevens and the district court. Both motions were denied on December 13, 1991. Trial began on Monday, December 16, 1991.

by this Court if this issue recurs. Under Seventh Circuit caselaw, an appeal from the denial of a motion for summary judgment on the ground of qualified immunity automatically stays the trial of the case. See *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). The district court may, however, make a reasoned finding that the appeal is frivolous or that the appellant has forfeited the right to appeal by delay, and proceed to trial.[2] *Id.* If the issue presented by this case recurs, then, a district court could certify that the appeal was frivolous, citing the Seventh Circuit's decision here, and proceed to trial. Although the court in *Apostol* indicated that such a certification by the district court is appealable, the Seventh Circuit would likely simply issue an order affirming the district court. The petitioners could, in theory, seek further review by this Court, but the trial might well be over by the time the Seventh Circuit and this Court acted. In any event the right not to be tried guaranteed by *Mitchell v. Forsyth*, 472 U.S. 511 (1985), would again be irrevocably lost. For all of these reasons, this Court should consider the merits of the petition.

2a. Respondent's arguments on the merits of the petition are also unpersuasive. His claim that an appeal in which a defendant asserts that he is entitled to qualified immunity because he did not commit the acts claimed by the plaintiff presents no issue separate from the merits (Br. in Opp. 6-7) is refuted by *Mitchell* itself, which recognized that "a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* [*v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)] test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." *Mitchell*, 472 U.S. at 528-29. See Pet. 8-9. *Mitchell* also recognized that "[t]he denial of a defend-

[2] Summary judgment motions are often ruled on by the district court shortly before trial. That was the case here (see Pet. 3 n.2) and in both of the two cases consolidated for decision in *Apostol*.

ant's motion for . . . summary judgment on the ground of qualified immunity easily meets th[e] requirements [of the collateral order doctrine]." 472 U.S. at 527. Respondent offers no justification for the Seventh Circuit's novel departure from this rule.[3]

b. Respondent concedes that the circuits are split on the issue presented here. Br. in Opp. 14. Although we disagree with respondent's analysis of the cases from the various circuits, an extended discussion of those cases is not warranted here: the fact that a split in the circuits exists merits review by the Court. Notably, respondent's only response to two of the cases cited by petitioners, *Burgess v. Pierce County*, 918 F.2d 104 (9th Cir. 1990), and *Wright v. South Arkansas Regional Health Center*, 800 F.2d 199 (8th Cir. 1986), is to assert that those cases are poorly reasoned. If that were true, it would be a good reason for affirming the lower court in this case; it is not a good reason for denying certiorari.[4] Further, the Tenth

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[3] Respondent claims that the denial of a motion for summary judgment on the basis of qualified immunity "because of issues of fact is not an appealable interlocutory decision. If it were, then all summary judgment motions would be immediately appealable, and the Court's careful line drawing in *Mitchell* and *Anderson* would have been wholly unnecessary." Br. in Opp. 8. This contention is meritless. The denial of a motion for summary judgment outside of the qualified immunity context is not appealable because it does not meet the requirements of the collateral order doctrine: it does not determine a claim separable from and collateral to the rights asserted in the action, and it can be effectively reviewed, if need be, on appeal from the final judgment. *Mitchell* recognized that this principle does not apply where a defendant's entitlement to qualified immunity is at issue, since qualified immunity is an "*immunity from suit* rather than a mere defense to liability" and "is effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526 (emphasis in original).

[4] One of the cases cited by respondent, *Riley v. Wainwright*, 810 F.2d 1006, 1007 (11th Cir. 1987) (per curiam), does arguably take a position consistent with that of the Seventh Circuit here, in which case the split in the circuits, by our count, would be the Seventh and Eleventh denying appeals, and the First, Third, Sixth, Eighth,

Circuit has recently also taken a position clearly inconsistent with the decision here. In *Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991), the court stated:

> Defendant . . . appeals from an order . . . denying a motion for summary judgment filed by [defendant] and three other federal officers on qualified immunity grounds. We have interlocutory appellate jurisdiction under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), even though the district court based its denial of the motion on a finding that disputed material facts exist in the case. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 719 (10th Cir. 1988).

945 F.2d at 1157 (footnote and parallel citations omitted). In short, although the precise contours of the circuit split are disputed by the parties, its existence is not. The Court should grant review to resolve the split.

c. Respondent's discussion of the policy issues advanced by petitioners is inadequate. Although respondent opines that allowing an appeal from the denial of a motion for summary judgment on the ground of qualified immunity where the defendant's defense is that he did not commit the acts claimed by the plaintiff "would allow public officials to impose 'unreasonable disruption, delay, and expense' in every case in which a plaintiff attempts to vindicate constitutional rights" (Br. in Opp. 10), all unsuccessful qualified immunity appeals impose delay and expense. If public officials take frivolous qualified im-

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Ninth, and Tenth allowing them. In candor, however, we find it unclear from the terse discussion in *Riley* whether the court of appeals dismissed the appeal because the district court found that there were disputed facts or because it had reviewed the record and found that it agreed with that determination. Only under the former reading is the Eleventh Circuit's decision consistent with the Seventh Circuit's. *Kaminsky v. Rosenblum*, 929 F.2d 922 (2d Cir. 1991), relied on by the court below and by respondent, however, is an example of the latter course. There, the court of appeals examined the record and agreed that there were disputed issues of fact, *id.* at 924, 927, rather than relying on the district court's determination to that effect, as the Seventh Circuit erroneously did here.

munity appeals, of course, sanctions are available just as in other cases. A district court's ruling in a case in which the qualified immunity defense is that the defendant did not commit the acts claimed by the plaintiff may be in error, just as in other cases, despite respondent's suggestion to the contrary (Br. in Opp. 9). See, *e.g.*, *Brown v. Grabowski*, 922 F.2d at 1112, 1115-16, 1117 n.12; *Unwin v. Campbell*, 863 F.2d at 133-34; *Ramirez v. Webb*, 835 F.2d at 1158-59. This case also presents such an erroneous ruling by the district court, which refused to grant summary judgment on respondent's excessive force claim despite petitioners' presentation of extensive medical evidence refuting respondent's claims of injury (see Pet. 3) and the respondent's failure, acknowledged by the district court, to offer any medical evidence whatsoever to rebut this showing (Pet. App. 18a, 20a). There is thus no basis for the lower court's creation of an exception to the appealability of the denial of a summary judgment motion based on qualified immunity.

There is likewise no basis for respondent's claim that the review of a qualified immunity summary judgment motion based on the claim that the defendant did not commit the acts alleged by the plaintiff is more burdensome than other appeals. Br. in Opp. 10. The court of appeals must examine the record on any qualified immunity appeal, as the Seventh Circuit acknowledges (Pet. App. 4a-5a). It is illogical that, under the Seventh Circuit's analysis, the only time the court of appeals cannot examine the record on an interlocutory qualified immunity appeal is when the district court finds, rightly or wrongly, that there is a genuine issue of fact as to whether the defendant committed the acts claimed by the plaintiff.

The Seventh Circuit's decision makes the interlocutory appeal authorized by *Mitchell* unavailable to those most deserving of that protection: public officials falsely or vindictively accused of acts they simply did not commit. It is contrary to decisions of this Court and of six other courts of appeals. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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